80-787

Supreme Court, U.S.
FILED
JUN 2 1980
MICHAEL RODAK, JR., CLERK

No. 80 —

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

Eugene B. Dinkin,
Petitioner

v.

Dinu Ganea, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Eugene B. Dinkin
7650 Balboa Blvd.
Van Nuys, CA 91406
Non-attorney, Pro-se

QUESTIONS PRESENTED

1. Whether a ruling by a three judge panel of a lower federal court declaring a state law unconstitutional, state authorities being comprehensively enjoined from any use thereunder, such ruling having been issued in respect of the Federal Civil Rights Act, may be qualified and modified by a second lower federal court of the same circuit to permit disregard of the first court's rulings due to the absence of a definitive U.S. Supreme Court ruling and/or the absence of a controlling state court precedent holding the law unconstitutional; and if such qualification is not contrary to the edict of *U.S. v. Mine Workers,* 330 U.S. 258 that it is the court of "first instance" which determines the validity of the law.

2. Whether the Federal Civil Rights Act, Title 42, Section 1983, an act in support of the 14th Amendment, continues to constitute a congressional mandate to invoke the 14th Amendment to restrain and limit the power of a state in all its departments, whether legislative, executive, or judicial, *Chicago B. and Q. R. Co. v. Chicago,* 166 U.S. 226; *Scott v. McNeal,* 154 U.S. 34; *Raymond v. Chicago Union Traction Co.,* 207 U.S. 20; *Yick Wo v. Hopkins,* 118 U.S. 356; *Virginia v. Rives,* 100 U.S. 313; *Ex Parte Virginia,* 100 U.S. 339; *Shelley V. Kramer,* 334 U.S.

3. Whether a federal district court may conclude that a state law has "never been declared unconstitutional" by another federal district court whose declaration of unconstitutionality has been reversed by a subsequent U.S. Supreme Court determination that the original party who raised the challenge was without standing, and concomitantly whether the Supreme Court ruling can thereby import that the original court was never a court of first instance and never had the "jurisdiction to determine its own jurisdiction", *Chicot County District v. Bank,* 308 U.S 371 at 376-77; *Weinberger v. Hynson, Wescott and Dunning,* 412 U.S. 609 at 627.

4. Whether a state civil service disciplinary proceeding to establish guilt or innocence for the offense of "insubordination" to the authority of state officers derived from a law already

declared unconstitutional is of its essence:

(a) a proceeding to enforce an unconstitutional law, violative of the 14th Amendment's prohibition of a state's enforcement of an unconstitutional law, Ex Parte Young, 209 U.S. 209.

(b) a proceeding violative of "the right of a party to be protected against a law which violates a constitutional right", *General Oil v. Crain,* 209 U.S. 229.

(c) a proceeding violative of the Supreme Court edict of *Sola Electric v. Jefferson Co.,* 317 U.S. 173 and *Awotin v. Atlas Exchange Bank,* 295 U.S. 209 that: "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation . . . are . . . federal questions the answers to which are to be derived from the statute and the federal policy, conflicting state law and policy must yield". And whether officers of the state of N.Y. have failed to yield to federal policy of the Federal Civil Rights Act, as determined by the finding of unconstitutionality of Section 72, in bringing a charge of insubordination and invoking the state civil service agreement authorizing disciplinary proceedings. The tertiary question being the authority of a U.S. District Court to approve of such violation of U.S. Supreme Court edict.

(d) a proceeding in conflict with the U.S. Supreme Court ruling of *Monroe v. Pape,* 356 U.S. 167 that prosecution under a patently unconstitutional statute is a "deprivation of . . . rights, privileges, or immunities secured by the Constitution" even though the law providing for the proceeding is said to be the authority for the prosecution rather than any provision of the unconstitutional law violated.

5. Whether in civil matters one can claim to have a "vested right" derived from a federal court declaration of unconstitutionality with injunction forbidding further usage of the law, such vested right being similar to or having the ethical and legal equivalency to that given a criminal defendant: "the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed", *Thompson v. Utah,* 170 U.S. 343; *Kring v. Missouri,* 107 U.S. 221 — in the case

of *Dinkin v. Ganea,* the law having been declared null and void at the time of the offense. And if there is such a vested right in civil matters, is it an enumerated right of the 9th Amendment or the Due Process clause of the 14th Amendment, *Twining, v. New Jersey,* 211 U.S. 78 at 113; *Hurtado v. California,* 110 U.S. 516 at 535-36.

6. Whether respondent state officers were free to disregard the rulings of the U.S. District Court, Southern District of New York when the administering agency of the law Section 72, the N.Y. State Civil Service Commission, was itself enjoined from further use of the law.

TABLE OF CONTENTS

	Page
Opinions Below	7
Jurisdiction	7
Questions Presented	1
Constitutional and Statutory Provisions Involved	8
Statement	8
I. Relationship to *Snead v. Dept. of Social Services, N.Y.C.*	8
II. Contempt of the Rule of Law by the Federal Courts	9
Reasons for Granting the Writ	12
I. The Federal Civil Rights Act's Purpose	12
II. The Legal Anarchy Question	13
Conclusion	15
Addendum	
Appendix A Opinion of U.S. District Court, E.D.N.Y.	
Appendix B Opinion of U.S. Court of Appeals, 2nd Cir.	

TABLE OF AUTHORITIES

Cases:	Page
Awotin v. Atlas Exchange Bank 295 U.S. 209	2, 15
Bucher v. Chesire R. Co., 125 U.S. 565	14
Burgess v. Seligman, 107 U.S. 20	14
Chicago B. @ Q. R. Co. v. Chicago, 166 U.S. 226	1
Chicot Cty. Dist. v. Baxter State Bank 308 U.S. 371	1
Ex Parte Young, 209 U.S. 209	2
General Oil v. Crain, 209 U.S. 229	2
Gosa v. Mayden, 413 U.S. 615	1
Greene v. U.S., 376 U.S. 149	1
Hurtado v. California, 110 U.S. 516	3
Kring v. Missouri, 107 U.S. 221	2
Kuhn v. Fairmont Coal Co., 215 U.S. 349	12, 14
Linkletter v. Walker, 381 U.S. 618	1
Monroe v. Pape, 356 U.S. 167	2
Mooney v. Holoman, 294 U.S. 103	14
Moore v. Dempsey, 261 U.S. 80	14
Palko v. Connecticut, 302 U.S. 323	14
Pasadena City Bd. of Educ. v. Spangler 424 U.S. 424	13
Perez v. Ledesma, 401 U.S. 82	14
Raymond v. Chicago Union Traction Co. 207 U.S. 20	1
Scott v. McNeal, 154 U.S. 34	1
Shelley v. Kramer, 334 U.S. 1	1, 12, 15
Snead v. Dept. of Soc. Serv., N.Y.C. 425 U.S. 457	3, 9, 11, 12

Sola Electric v. Jefferson Co.,
317 U.S. 173 — 2, 15

Thompson v. Utah, 170 U.S. 343 — 2

Twining v. New Jersey, 211 U.S. 78 — 3

U.S. ex rel Lawrence v. Woods,
432 F.2d 1072 — 9

U.S. v. Mine Workers, 330 U.S. 258 — 1, 9, 13

U.S. v. Shipp, 203 U.S. 563 — 9, 13

Virginia v. Rives, 100 U.S. 313 — 1

Walker v. City of Birmingham.
388 U.S. 307 — 1

Weinberger v. Hyman, Wescott @ Dunning,
412 U.S. 609 — 1

Yick Wo v. Hopkins, 118 U.S. 356 — 1

Younger v. Harris, 401 U.S. 37 — 15

Constitution and Statutes:

Ninth Amendment to the U.S. Constitution — 3

Fourteenth Amendment to the U.S Constitution — 1, 2, 3, 9

Federal Civil Rights Act:
Title 42, U.S. Code Section 1983 — 1, 12, 13

Petitioner requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on Dec. 11th, 1979. That judgment affirms the ruling of the United States District Court for the Eastern District of New York that respondent officers of the New York State Department of Mental Hygiene were within the law in continued utilization of a statute declared unconstitutional by a Three Judge Panel of the U.S. District Court, Southern District of New York despite the existence of an injunction prohibiting such continued usage, during the pendency of appeal to the U.S. Supreme Court, by virtue of the retroactivity of the Supreme Court's ruling that the party who had challenged the law had been without standing.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported and is set forth as Appendix A hereto (App. 1).[1] The opinion of the District Court is not yet officially reported, and is set forth as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on Dec. 11th, 1979. A timely petition for rehearing en banc was denied on April 8th, 1980, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

---

1. The opinion of the Court of Appeals was percuriam. The panel was composed of the Circuit Judges Medina, Mansfield, and Meskill.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions set forth in full in Addendum infra are involved in the questions presented by this petition: The Fourteenth Amendment to the United States Constitution; the "Federal Civil Rights Act", United States Code, Title 42, Section 1983.

STATEMENT

I. Relationship to *Snead v. Dept. of Social Services, N.Y.C.*

This is a companion case to *Snead v. Dept. of Social Services, N.Y.C.*, which is known to the U.S. Supreme Court due to direct appeals on three instances. The Snead case is reported as follows:

416 U.S. 977, 94 S. Ct. 2376, 40 L. Ed 2d 755
421 U.S. 982, 95 S. Ct. 1985, 44 L. Ed 2d 474
425 U.S. 457, 96 S. Ct. 1630, 48 L. Ed 2d 88

The substance of the petitioner's complaint in the U.S. District Court, Eastern District of New York was that he had been unconstitutionally deprived of property and liberty, when respondent state officers of a state psychiatric hospital effected his removal from a civil service social work assistant position for the offense of "insubordination" after he refused to report for a psychiatric evaluation on the command of the respondents, whose authority derived from the provisions of Section 72 of the N.Y. State Civil Service Law, which had already been rescinded by the Nov. 18th, 1974 ruling of the U.S. District Court, Southern District of New York holding Section 72 unconstitutional, a comprehensive injunction having been issued precluding "any action thereunder". As such, the petitioner stressed that he had been subject to arbitrary power in violation of the privileges and immunities clause of the 14th Amendment.

The significant event of *Dinkin v. Ganea* occurred subsequent to the first remand by the U.S. Supreme Court in the Snead case. After the Nov. 18th, 1974 Southern District rulings defendants of the Snead case served Notice of Appeal to the U.S. Supreme Court. However, even before this they attempted to secure from the Southern District Court a stay of the declaratory and injunctive ruling and a modification of the injunctive ruling, and their motions were denied. On April 7th, 1975 their application for a stay pending direct appeal to the U.S. Supreme Court was denied by Mr. Justice Blackman.

II. Contempt of the Rule of Law by the Federal Courts

In the face of these legal events respondents decided, or were counseled to the position, that the ruling of a Three Judge federal panel was of no consequence, and possibly a forth-coming favorable stay decision would be given by Mr. Justice Blackmun which would vouchsafe the legality of their continued utilization of Section 72 in defiance of the U.S. District Court, S.D.N.Y. By this process, this petitioner believes, that respondents did make a mockery of the Rule of Law, which in theory distinquishes this republic from a police state. And, not surprisingly to this petitioner, respondents succeeded in both the U.S. District Court E.D.N.Y. and the U.S. Court of Appeals; Second Circuit in relegating *U.S. v. Mine Workers,* 330 U.S. 258 and *U.S. v. Shipp,* 203 U.S. 563 to the category of historical curiosities.

This was accomplished when the district judge decided in deference to the theory of Chief Judge Sweigert of the 7th Circuit in U.S. ex rel *Lawrence v. Woods,* 432 F2d 1072 that the state courts under the Supremacy Clause of the U.S. Constitution have "coordinate" authority with the lower federal courts to make decisions with respect to federal questions; and, may thus make

rulings independent of federal court decisions until the U.S. Supreme Court has ruled. So, by some mystic process the Eastern District judge elevated respondent defendants to the status of state judges who judgment is independent and coordinate with that of a Three Judge District Court Panel. Defendants, to compound the farce, actually argued that they had been in a quandry as to whether to follow the federal court ruling or that of a state court; and that they decided in 1975 that they had been "affirmatively required" to follow the state court ruling, which had been issued in 1976. This 1976 ruling instructed police department officials to follow Section 72. Defendants, however, did not reveal to this petitioner or the judges of the Second Circuit the exact name of the tea leaf reading establishment which counseled them in 1975 as to the 1976 ruling.

In conjunction with this adventure in time travel, the district court judge also decided, possibly in deference to the Soviet system of revision of history, that Section 72 "had never been declared unconstitutional" due to the ultimate ruling of the U.S. Supreme Court that Snead lacked standing to challenge Section 72. Thus, the district judge concluded that this petitioner's access to the federal court had been precluded by the Supreme Court's 1976 ruling and that his only avenue to a determination of the issues was by a new challenge to the constitutionality of Section 72, which could not be allowed due to his lack of standing. No consideration was given whatsoever, and not a single word written in either the district court or appeals court decisions as to the operative validity of a faulty decision prior to reversal by the U.S. Supreme Court. Ostensibly, the Second Circuit reserves such cogitation for cases in which all parties have the requisite stature of membership in the N.Y. Bar Association.

This petitioner alleges not that the district judge and the appeals panel have erred through oversight or neglect of attention to the issues, but rather that they have through deliberate, conscious bias and debased corruption joined the respondents in perpetrating a fraud, and have deliberately sacrificied justice to the craven dictates of national security.

At the district court level respondents were allowed 20 months to answer the petition, and were allowed to make two bad faith

motions for extention of time to answer. During this period of time one defense counsel claimed that the health problems of his child had produced interfering emotional problems preventing him from answering the petition. A second defense counsel had been fired for the misbehavior of not submitting any papers in this case. These were, this petitioner alleges, deliberate stall tactics whereby defendants sought to prevent a district court ruling until the U.S. Supreme Court could issue its final ruling in the Snead case. The district judge joined in this charade by denying petitioner's motions for judgment by default and for summary judgment, on one occasion emitting: "Since you are not an attorney, I will speak for you. Your motion is denied!" On another occasion, with complete cognizance that this case dealt with the validity of a psychiatric examination law, the district judge burlesqued: "I don't see anything wrong with being examined by a psychiatrist. I would myself agree to be examined. How could a person know that he possessed the psychological suitability to perform as a district judge if not by means of a psychiatric evaluation?" When interrogatories were not answered, the judge did agree to issue an order for discovery, lecturing the petitioner that this order covered all forms of discovery, yet he uttered not a single word a year later when the third defense counsel argued that no express order for discovery had been entered into the file.

At the district court level defense counsel argued falsely that there had been "stays of judgement throughout" in the Snead case permitting respondents to utilize Section 72. At the appeals court level defense counsel argued that "except for a brief period of time" there had been stays of judgment. Unless these stays were issued by the Supreme Court, they are phantom rulings because they do not appear on the docket sheet of that case. An attempt by the petitioner to examine the file of the Snead case was denied by the office of the clerk of the Southern District Court with explanation that the file was unavailable. A later request by mail for a listing of Supreme Court stays in that case was not answered.

REASONS FOR GRANTING THE WRIT

I. The Federal Civil Rights Act Purpose Question

It is stated in *Shelley v. Kramer,* 334 U.S. 1 that the Federal Civil Rights Act was intended to interpose federal law between individual citizens and the states' exercise of power, either through its executive, legislative, or judicial departments as a means of protecting the citizen from illicit or abusive use of state power.

In the face of this clear purpose mandated by Congress, the district court judge had decided that the opposite thesis should hold, namely, that the state's exercise of power over the individual should be protected from unsavory persons who invoke the Federal Civil Rights Act. Therefore, he ruled that respondents were not bound by the Southern District Court's declaratory and injunctive ruling in the Snead case under the Civil Rights Act because: in order for a federal district court's declaration of unconstitutionality to have any validity there must exist a controlling state court precedent, that is, a state court decision regarding the law as unconstitutional.

This is an exercise in the absurd for were there a prior, concurring and controlling state court precedent that a state law was unconstitutional with comprehensive injunction forbidding any action thereunder, then there would be no need in the first place for anyone to challenge the law in the federal court. And if such a concurring and controlling decision were reached in the state court after the federal declaration of unconstitutionality, as the necessary condition to bestow validity on the federal ruling, then the state courts would have appellate power over the lower federal courts. — In contrast to this thesis which vitiates the provisions of the Federal Civil Rights Act, I would stress a reading of the opinion of Mr. Justice Harlan in *Kuhn v. Fairmont Coal Co.,* 215 U.S 349.

It appears that a single federal district judge through a process of legerdemain has voided a national law, Section 1983, without that law's constitutionality being at issue in this case; or, while preaching the necessity of following Supreme Court guidelines, has created his own. In order for this judge to acknowledge the

rulings of the Southern District Court he required a definitive U.S. Supreme Court decision. So, it appears that for the Federal Civil Rights Act to have any meaning, the Supreme Court must rule in each case. — This man has therefore repealed the Civil Rights Act. The appeals panel of the Second Circuit affirmed by issuing a vaguely written, cursory opinion which did not touch upon a single issue. I interpret that decision as almost an act of abstention and a waiver of responsibility, and therefore believe the U.S. Supreme Court should issue the writ.

Supreme Court decisions which I believe to be pertinent to the issue of the Rule of Law and integrity of the appellate process and which militate toward the view that respondents had no choice other than obedience to the rulings of the Southern District Court in Snead:

U.S. v. Mine Workers, 330 U.S. 258
U.S. v. Shipp, 203 U.S. 563
Walker v. City of Birmingham, 388 U.S. 307
(Opinion of Mr. Justice Stewart)
Pasadena City Bd. of Educ. v. Spangler,
424 U.S. at 438-39
(Opinion of Mr. Justice Rehnquist)

Supreme Court decisions which might be pertinent to the issue of the operative validity of a defective ruling of unconstitutionality and the issue of retroactivity of a U.S. Supreme Court decision:

Chicot Cty. Drainage v. Baxter State Bank,
308 U.S. at 376-77
Greene v. U.S., 376 U.S. at 160
Linkletter v. Walker, 381 U.S. at 625
Gosa v. Mayden, 413 U.S. at 675

II. The Legal Anarchy Question

The Eastern District Court with the Court of Appeals, Second Circuit concurring has created a straw man issue. While the question of interpretation of the U.S. Constitution's Supremacy Clause as to the power or absence of power of the lower federal courts over the state courts in matters of federal questions is a subject of considerable controversey, and intricacy, it is a sham

issue in this case. And it is certainly not resolved as a rule of comity by the blanket observation that the federal courts must lean toward state courts' interpretations of state laws — that a state law is unconstitutional. (Again, see Justice Harlan opinion in *Kuhn v. Fairmont Coal Co.,* discussing *Burgess v. Seligman,* 107 U.S. 20 and *Bucher v. Chesire R. Co.,* 125 U.S. 555).

The Eastern District judge, I believe, has in effect stated that a federal judge should be free to rule as he interprets a state court might rule; that it is a constraint of a federal judge's discretion to be required to acknowledge the ruling of another federal court's Three Judge Panel's determination that a state law is unconstitutional upon its face and its further utilization comprehensively enjoined. (I have discussed the Three Judge Panel statute in papers submitted to the Court of Appeals). And at bottom line, the judge has implied that if a state court could through its sovereignty disregard the federal ruling, that respondents as state officers could thereby exercise lawful anarchy in continued utilization of an unconstitutional law. By such logic the district judge, in my estimation, has declared himself a criminal. The three judges of the appeals panel in affirming have done no less.

I believe that I have cause to request that the U.S. Supreme Court consider this complex of issues, especially in respect of the exposition of Mr. Justice Brennan as to the effect of federal rulings of unconstitutionality in *Perez v. Ledesma,* 401 U.S. at 124. I believe also that the U.S. Supreme Court has an obligation to investigate allegations of corruption within the court sytem, *Palko v. Connecticut,* 302 U.S. 323 at 327; *Moore v. Dempsey,* 261 U.S. 86; *Mooney v. Holoman,* 294 U.S. 103.

And I also ask the U.S. Supreme Court to explain to me or to Itself the presence of the Honorable Harold Medina on the appeals panel in light of the fact that he has had assistant Warren Commission counsel M. Laulicht as his clerk; in light of the fact that the defense counsel in Snead was N. Redlich, Warren Commission counsel; and in light of the fact the E. B. Dinkin is subject of Warren Commission Documents 943 and 1107 and sued federal agencies, acting as investigatory agent of the Warren

Commmission in *Dinkin v. U.S. Dept. of Defense and C.I.A.*, Civil Action 75-1015 at the U.S. District Court, E.D.N.Y. (unreported). It is my view that this question will not be acknowleged by the U.S. Supreme Court.

Supreme Court decisions which I believe to be pertinent to the issue of the supremacy of federal law:

Sola Electric v. Jefferson Co., 317 U.S. at 176-177
Awotin v. Atlas Exchange Bank, 295 U.S. 209
Younger v. Harris, 401 U.S. at 63
(Justice Douglas dissenting)
Shelley v. Kramer, 334 U.S. at 14

This case, I believe, exemplifies a subterranean form of law which exists in this country. It is catch-as-can law. Law which requires courts to scoff at their traditional rules. Law by which parties who violate and set aside court orders thereby accrue power to act as prosecutors. This petition questions whether such anarchy will be sanctioned by the highest court of the land.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Eugene B. Dinkin
7650 Balboa Blvd., #12
Van Nuys, CA 91406
Non-attorney, Pro-se

ADDENDUM

1. The Fourteenth Amendment to the United States Constitution: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Federal Civil Rights Act:
Title 42, U.S. Code
Section 1983. Civil Action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redresss. (R.S. Section 1979).

FILED
CLERK'S OFFICE
DISTRICT COURT E.D.N.Y
OCT 23 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

EUGENE B. DINKIN,

Plaintiff,

-against-

DINU GANEA, et al.,

Defendant.

----------X

75 C 1501

MEMORANDUM OF DECISION AND ORDER

COSTANTINO, D.J.

Plaintiff commenced this action on September 11, 1975 pursuant to 42 U.S.C. §1983. Jurisdiction is based on 28 U.S.C. §§1331 and 1343(3)(4). Defendants, various state employees, have moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) and for summary judgment pursuant to Fed. R. Civ. P. 56. The defendants' motions are granted.[1]

Plaintiff, Eugene B. Dinkin, ("Dinkin"), was employed at the New York State Department of Hygiene's South Beach Psychiatric Center ("SBPC"). He held the permanent civil service position of Psychiatric Social Work Assistant. His position brought him in constant contact with individuals who had histories of mental problems. On March 25, 1975 his employment at SBPC was terminated.

Dinkin's employment at SBPC was an unpleasant experience for all involved. Dinkin's many submissions to the court evidence his belief that defendants' were a group of hostile, inefficient, and unfit bureaucrats who abused their power when dealing with him. Stated mildly, Dinkin was dissatisfied with his superiors.

In December 1973, Dinkin attended a meeting with his supervisor, Sarah Connell, the Chief of Service at Northwest Brooklyn Out-Patient Clinic, to discuss Dinkin's transfer to another unit at SBPC. Dinkin also met with another supervisor, Laela Aaen, concerning his work in a satellite clinic in a church basement. Dinkin made essentially the same assertions at both meetings. He was concerned about the possibility that priests may listen to patient interviews. He stated that his presence on church grounds made him vomit and caused headaches. He also believed that nuns and priests were perverts, that religious institutions should be abolished, and that as a Jew, he supported the persecution of Jews in the Soviet Union. Based on these revelations, Connell seriously questioned Dinkin's ability to function properly in his position.

In December 1974, Dinkin met with defendant Jack O'Brien, the team coordinator of the psychiatric social work assistants at SBPC. The purpose of the meeting was

tc remind Dinkin to attend the scheduled team meetings. Dinkin became angry and left in the middle of the conversation. He later returned and objected to O'Brien's reminder. Dinkin also stated that he had difficulty relating to O'Brien because O'Brien looked effeminate and may have been a homosexual. He also stated that he had been in knife fights with homosexuals in Sweden and knew karate and boxing. Dinkin then departed.

Prior to this meeting, Dinkin wrote to O'Brien and expressed his desire to be placed under the supervision of Dr. Winn. Dinkin believed that Winn, unlike the other supervisors, showed good judgment and professional honor and was "not homosexual." (original emphasis)

On January 2, 1975 Dinkin met with defendant Dr. Arnold Winston, the Deputy Director of the clinical programs at SBPC. The meeting was held at the request of the SBPC personnel director and one of Dinkin's supervisors. Winston described Dinkin as "anxious, distant and hostile." Dinkin complained of homosexual overtures made to him by other staff members and stated that one of his supervisors was a homosexual. He also told of problems with homosexuals at his residence. When asked about other people's fear of him, Dinkin indicated that he was a Golden Gloves boxer and that he carried out his threats. As the meeting progressed, Dinkin apparently grew hostile and illogical.

Winston suggested that Dinkin take a medical leave of absence. Dinkin rejected that advice and stated that he would contest any attempts to place him on a medical leave of absence.

Kenneth Glott, another of Dinkin's supervisors, also indicated that Dinkin's employment at SBPC was marked with difficulties. He indicated that Dinkin was psychologically troubled.

Each of Dinkin's supervisors questioned his suitability for the position he held. Each was disturbed by the prospect of Dinkin's continued contact with mentally troubled patients, and recommended either a transfer to less sensitive employment or termination of employment.

As a result of these incidents, an appointment for a medical examination was made for Dinkin on January 27, 1975. Dinkin failed to keep his appointment. A second appointment was scheduled for February 10, 1975. That appointment was also not kept. As a result, Dinkin was served with a notice of discipline, dated February 10, 1975, pursuant to Article 33 of the agreement between the State of New York and the Civil Service Employment Association ("CSEA"), Dinkin's union. The notice informed Dinkin that he would be terminated from his employment due to the alleged acts of insubordination. A hearing was scheduled to consider the matter.

On February 7, 1975, Dinkin had already filed a grievance in which he pleaded not guilty to the alleged insubordination. He objected to the making of medical appointments on his behalf and questioned the state's power to require his appearance. He considered the notices of appointment to be illegal orders. His grievance was filed pursuant to Article 33 of the State-CSEA agreement.

A grievance hearing was scheduled for March 5, 1975. However, on March 3, 1975, Dinkin wrote to John Lagatt, the Assistant Commissioner of the Department of Mental Hygiene and withdrew his grievance. As a result, Dinkin's employment was terminated pursuant to Article 33.[2]

Dinkin now raises numerous claims which he alleges arose from the series of transactions which resulted in his dismissal. The claims will be discussed seriatim.

I. THE §1983 CLAIM

Dinkin makes numerous arguments to support his claim under 42 U.S.C. §1983. The basic contention is that New York Civ. Serv. Law §72, which permits state employer's to require medical examinations of their employees, was illegally applied to him.[3] The court finds that §72(1) was properly invoked, that Dinkin has no standing to contest the constitutionality of §72, and that his employment was terminated in compliance with the requirements of due process.

A. The Mental Examination Order

Dinkin claims that N.Y. Civ. Serv. Law §72 was fraudulently invoked by his employers. He argues that since the statute was declared unconstitutional by the district court in Snead v. Dep't of Social Services, 355 F.Supp. 764 (S.D.N.Y. 1973), vacated and remanded, 416 U.S. 977 (1974), reaffirmed, 389 F.Supp. 935 (S.D.N.Y. 1975), vacated and remanded for consideration of mootness, 421 U.S. 982 (1975), motion for entry of judgment granted, 409 F.Supp. 995 (S.D.N.Y. 1975), vacated and remanded 425 U.S. 457 (1976) his employers had no authority to order him to appear for a psychiatric examination and, consequently, no basis for terminating his employment. Dinkin also claims that the Article 33 procedures had no effect because they were based upon his refusal to follow an unconstitutional statute.

The court finds that Dinkin's claims are without merit. First, Dinkin relies upon the district court opinion in Snead v. Dep't of Social Services, supra. The District Court held New York Civ. Serv. Law §72 to be unconstitutional on March 12, 1973. After two appeals to the Supreme Court, the Supreme Court ultimately held that Snead lacked standing to challenge the constitutionality of §72. The Court vacated the District Court's judgment and remanded the cause for dismissal of the complaint. 425 U.S. 457. Therefore, the statute was never held to be unconstitutional, and the State of New York was free to apply its mandate.[4]

Second, the New York courts adhere to the view that only decisions of the United States Supreme Court are binding on them. New York Rapid Transit Corp. v. City of New York, 275 N.Y. 258, 9 N.E.2d 858 (1938), aff'd, 303 U.S. 573 (1938); People v. Williams, 93 Misc.2d 267, 402 N.Y.S.2d 751 (Sup.Ct. 1978). Thus, the decisions of lower federal courts are given due consideration, but are not considered to be controlling precedents. See People v. Joseph, 93 Misc.2d 267, 402 N.Y.S.2d 751 (Sup.Ct. 1978); People v. Williams, supra. In United States ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971), the court, faced with a similar issue, noted:

> The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal. On the other hand, because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts. Id. at 1075-76.

Here, there was no controlling Supreme Court or state court precedent requiring the State to cease using §72. Thus, Dinkin's employers were not bound to accept the ruling of the district court in Snead when they attempted to invoke the provisions of §72.

Third, even if the district court's opinion in Snead were a binding precedent, it would not support Dinkin's

contentions. In Snead, plaintiff was placed on an involuntary leave of absence without pay and without an adversarial hearing prior to placing her on involuntary leave. Since §72 failed to provide a prior hearing, the district court in Snead found the statute to be unconstitutional. Here, on the other hand, Dinkin was afforded the opportunity for a full adversary hearing. Dinkin was informed of the charges of insubordination, and of his right to contest those charges at the hearing with his union representative or attorney. Dinkin, by withdrawing his grievance, failed to take advantage of these procedures. Thus, the availability of the hearing procedures distinguishes Snead on its facts, and cures the constitutional defect found by the Snead court.

While Dinkin presumes that §72 is already unconstitutional and does not raise a new constitutional challenge, the court believes that were such a challenge made, it would dismiss Dinkin's complaint for lack of standing. The statutory procedure of §72 was never applied to Dinkin. While medical appointments were made, Dinkin refused to keep them. In Snead, the Supreme Court untimately held that plaintiff lacked standing. There, the plaintiff kept the medical appointments and was examined. However, since the examinations were not conducted in compliance with the statute, plaintiff lacked standing. 425 U.S. at 458.

Dinkin, having failed to appear for the examinations, is even more removed from a constitutional challenge than was the plaintiff in Snead, and therefore lacks standing to make such a challenge.[5]

Accordingly, there is no merit to Dinkin's claim that defendants' applied an unconstitutional statute to him.

B. Constitutionality of Procedures Followed

Dinkin admits that his due process and equal protection claims are "questionable". Plaintiff's Motion for Rehearing ¶11. He bases his claims on the allegedly fraudulent application of §72. The court finds these claims to be without merit.[6]

A public servant may not be denied a liberty or property interest without due process of law. Board of Regents v. Roth, 408 U.S. 564 (1972). Before a public servant may be terminated from his employment, he must be afforded a full and fair opportunity for an adversarial hearing. Perry v. Sindermann, 408 U.S. 593 (1972). The right to a hearing may be waived by the individual. Boddie v. Connecticut, 401 U.S. 371 (1971).

Here, Dinkin was afforded the opportunity to contest the charges of insubordination brought against him.[7] He does not challenge the adequacy of those procedures. Rather, he adheres to his contention that because §72 was declared

unconstitutional by the district court in Snead, he was under no duty to comply with those procedures. It was Dinkin's continued and wilful refusal to avail himself of the procedural due process rights afforded him which ultimately caused his dismissal. Therefore, the court finds that he was not deprived of liberty or property without due process.

Moreover, the State was not required to hold a hearing prior to the medical examination. Leonard v. Sugarman, 466 F.2d 1366 (2d Cir. 1972). The state, to satisfy due process, is required to provide a meaningful opportunity to be heard at a meaningful time. Boddi v. Connecticut, supra. See also Leonard v. Sugarman, supra. Dinkin was afforded that right and refused to accept it.

II. THE FIRST AMENDMENT CLAIM

Dinkin claims that he was directed to submit to a medical examination pursuant to §72 in retaliation for his expressions of opinion on the operations of mental health clinics. The record before the court fails to support this claim.

Dinkin's behavior and threatening language would be disturbing, at the least. In light of the sensitive nature of Dinkin's employment surroundings, the state officials had reasonable grounds for being concerned with Dinkin's

suitability for his line of work. See Connecticut State Federation of Teachers v. Bd. of Educ. Members, 538 F.2d 471 (2d Cir. 1976). Because there was a reasonable basis for ordering the examination, the court finds that the state employers neither abused their authority nor retaliated against Dinkin in pursuing the §72 procedures. Compare Pickering v. Board of Education, 391 U.S. 563 (1968).

Moreover, the record clearly supports a finding that Dinkin was dismissed for his insubordinate conduct and not for the expression of opinions. Dinkin has failed to establish that any constitutionally protected expression was either a substantial or motivating factor in his dismissal. See Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977).

In any event, the court finds that the statements made by Dinkin were not constitutionally protected because they were essentially private communications through which he expressed his opinions concerning clinical operations of the unit. See Connecticut State Federation of Teachers v. Board of Education Members, supra; Roseman v. Indiana Univ. of Pennsylvania at Indiana, 520 F.2d 1364 (3d Cir. 1975); cert. denied, 424 U.S. 921 (1976). Moreover, Dinkin's threatening and disruptive remarks were not constitutionally protected. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Roseman v. Indiana Univ. of Pennsylvania, at Indiana, supra.

Therefore, Dinkin has failed to establish a First Amendment claim under 42 U.S.C. §1983.

III. COMMON LAW TORT CLAIMS

Dinkin also seeks relief for claims of libel and malpractice.[8] However, 42 U.S.C. §1983 does not apply to claims for libel, Rosenberg v. Martin, 478 F.2d 520 (2d Cir. 1973), cert. denied, 414 U.S. 1033 (1973); Heller v. Roberts, 386 F.2d 832 (2d Cir. 1967); Assoc. for the Preservation of Freedom of Choice v. Simon, 299 F.2d 212 (2d Cir. 1962); Lombard v. Board of Education, 407 F.Supp. 1166 (E.D.N.Y. 1976); Schumate v. People of the State of New York, 373 F.Supp. 1166 (S.D.N.Y. 1974), or malpractice, Smith v. Clapp, 436 F.2d 590 (3d Cir. 1970).

Dinkin, however, argues that this court has pendent jurisdiction of these claims. Yet, where, as here, the federal jurisdictional peg is lost because the federal claims are dismissed, the retention of the state law claims is a matter of judicial discretion. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966); Naylor v. Case and McGrath, 585 F.2d 557 (2d Cir. 1978). Assuming pendent jurisdiction of these claims, the court finds that the best course is to dismiss the state law claims.[9] See United Mine Workers of America v. Gibbs, supra.

The court has reviewed the many other allegations and contentions of Dinkin and finds them to be repetitive or

totally without merit. Accordingly, the defendant's motions for summary judgment and for dismissal are granted in all respects. This decision shall constitute the final judgment of the court. The Clerk of the Court is directed to enter judgment pursuant to Fed. R. Civ. P. 58.

So ordered.

U. S. D. J.

FOOTNOTES

1. Plaintiff cross moved for summary judgment on his complaint. Since his motion raises the same issues presented by defendants' motion, the court need not address plaintiff's motion separately.

2. The procedures of Article 33 were followed in lieu of New York Civ. Serv. Law §§75 and 76 pursuant to Article 33.1 of the CSEA agreement. Article 33.4 permitted the employer to terminate employment upon failure of the employee to file a grievance. See Appendix A.

3. New York Civ. Serv. Law §72(1) provides in relevant part:

> When in the judgment of an appointing authority an employee is unable to perform the duties of his position by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's compensation law, the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction. If, upon such medical examination, such medical officer shall certify that such employee is not mentally fit to perform the duties of his position, the appointing authority may place such employee on leave of absence. An employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons therefor. An employee on such leave of absence shall be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his credit.

4. Dinkin's reliance on Howat v. Kansas, 258 U.S. 181 (1922) is misplaced both on the law and the facts of that case.

5. Dinkin, in his affidavit in Opposition to Defendants' Motion for Summary Judgment at page 5 admits that he does not wish to challenge the constitutionality of §72. He claims that §72 was "never applied lawfully to the plaintiff. Consequently, the plaintiff has no standing to challenge its constitutionality." See New York Civ. Serv. Comm'n v. Snead, 425 U.S. 457 (1976).

6. Dinkin bases his equal protection claim on his own interpretation of 42 U.S.C. §1985. The claim is frivolous and does not require further discussion.

7. It is important to note that Dinkin was dismissed for insubordination and not for mental incompetency. Insubordination is a basis for dismissal or supension under New York law. Ector v. Salzmann, 54 App.Div.2d 1017, 388 N.Y.S.2d 363 (3d Dep't 1976); Reisig v. Kirby, 62 Misc.2d 632, 309 N.Y.S.2d 55 (Sup.Ct. 1968), aff'd, 32 App.Div.2d 1008, 299 N.Y.S.2d 398 (2d Dep't 1969).

8. Dinkin also alleged fraudulent action in the application of §72. The court's findings concerning the invocation of §72 belie Dinkin's claim.

9. The court questions the merits of these claims. In light of this court's determination, they are apparently frivolous and should not be used to burden the state courts.

APPENDIX A

Agreement

BETWEEN
THE STATE OF NEW YORK
AND
THE CIVIL SERVICE
EMPLOYEES ASSOCIATION, INC.

Professional Scientific & Technical Services Unit

1973-76

ARTICLE 33

Resignation and Discipline

33.1 Effective July 1, 1973, the following disciplinary procedure for incompetency or misconduct shall apply to all employees as provided herein in

lieu of the procedure specified in the Civil Service Law Sections 75 and 76.

33.2 Employee Rights

a. An employee shall be entitled to representation by CSEA or an attorney at each step of the disciplinary procedure.

b. No employee shall be required to submit to an interrogation before a contemplated notice of discipline or request for resignation, or after a notice of discipline has been served upon him unless he is notified in advance in compliance with the provisions hereinafter set forth and he is afforded the opportunity of having a CSEA representative present and apprised in writing of all rights set forth herein.

c. No employee shall be requested to sign any statement regarding his incompetency or misconduct unless a copy of the statement is supplied to him and any statements or admissions signed by him without having been supplied to him may not subsequently be used against him.

d. No recording devices or stenographic or other record shall be used during an interrogation unless the employee is advised in advance that a transcript is being made and he is thereafter supplied a copy.

e. In all disciplinary proceedings, the employee shall be presumed innocent until proven guilty and the burden of proof on all matters shall rest upon the employer.

f. An employee shall not be coerced, intimidated or suffer any reprisals either directly or indirectly that may adversely affect his hours, wages or working conditions as the result of the exercise of his rights under this Article.

33.3 Resignation

a. An employee who is advised that he is alleged to have been guilty of misconduct or incompetency and is therefore requested to resign shall be given a statement written on the resignation form stating:

1. that he has a right to consult a representative of CSEA or an attorney before executing the resignation and a reasonable period of time will be afforded for such purpose.

2. that he may decline the request to resign and that in lieu thereof, a notice of discipline must be served upon him before any disciplinary action or penalty may be imposed pursuant to the procedure provided in the Agreements between the State and CSEA.

3. that in the event a notice of discipline is served, he has the right to object to such notice by filing a grievance,

4. that such disciplinary grievance procedure terminates in binding arbitration.

5. that the Agreements provide further that he would have the right to representation at every stage of the procedure, and

6. that he has the right to refuse to sign the resignation and that his refusal in this regard cannot be used against him in any subsequent proceeding.

b. A resignation which is requested and secured in a manner which fails to comply with this procedure shall be null and void.

33.4 Disciplinary Procedure

a. Where the appointing authority or his designee seeks the imposition of a written reprimand, suspension without pay, a fine not to exceed $100, reduction in grade, or dismissal from service, notice of

such discipline shall be made in writing and served upon the employee. Discipline shall be imposed only for incompetency or misconduct. The specific acts for which discipline is being imposed and the penalty proposed shall be specified in the notice. The notice served on the employee shall contain a description of the alleged acts and conduct including reference to dates, times and places.

b. The Executive Director of CSEA shall be advised by registered or certified mail that the notice of discipline has been served.

c. The notice of discipline served on the employee shall be accompanied by a written statement that:

1. the employee has a right to object by filing a grievance within 10 days,

2. the grievance procedure provides for a hearing by an independent arbitrator at its final stage,

3. he is entitled to representation by CSEA or an attorney at every stage of the proceeding,

4. no penalty can be implemented until the arbitrator's determination, if he objects, in accordance with this Article, a copy of which shall be supplied.

d. The penalty proposed, or such other penalty as directed by the arbitrator, may not be implemented (a) until the employee fails to file a grievance within 10 days, (b) fails to file a timely appeal as provided below, or (c) until and to the extent that it is upheld by the disciplinary arbitrator.

e. The notice of discipline may be the subject of a grievance before the department or agency head at Step 3 of the grievance procedure and shall be filed by the employee wit hin 10 working days of the notice of discipline. The employee shall be enti-

tled to a meeting to present his position to the department or agency head or his designee within 10 working days of the receipt of the grievance and a decision shall be rendered within two working days of such meeting.*

f. If the grievance is not resolved, it may be appealed to independent arbitration by filing a notice with the appointing authority within 10 working days of the receipt of the Step 3 decision.

g. The independent arbitrator shall hold a hearing within 10 working days after selection and a decision shall be rendered within five working days of the date of review or within five working days after receipt of the transcript if either party elects a transcript as provided in this Article.

h. The arbitrator shall be subject to the provisions of subdivisions of d.1.D. and d.1.E. of Section 34.2. The arbitrator's decision with respect to guilt or innocence, penalty or probable cause for suspension shall be final and binding upon the parties and he may approve, disapprove or take any other appropriate action warranted under the circumstances including but not limited to ordering reinstatement and back pay for all or part of a period of suspension. If the arbitrator upon review finds probable cause for the suspension, he may consider such suspension in determining the penalty to be imposed.

*In the case of a department or agency which normally operates on a seven day a week basis, reference to 10 working days shall mean 14 calendar days and reference to five working days shall mean seven calendar days and reference to two workins days shall mean four calendar days.

i. A grievance may be settled at any stage of the disciplinary grievance procedure. The terms of the settlement shall be agreed to in writing. An employee executing such a settlement shall be offered a reasonable opportunity to have his attorney or a CSEA representative present before he executes such a settlement. The Executive Director of CSEA shall be advised of the settlement within 24 hours.

j. Prior to exhaustion or institution by an employee of the grievance procedure applicable to discipline, such an employee may be suspended without pay only if the appointing authority determines that there is probable cause to believe that the employee's continued presence on the job represents a potential danger to persons or property or would severely interfere with operations. Such determination shall be reviewable by the arbitrator in accordance with subdivision h of this section to determine whether the appointing authority had probable cause. The Executive Director of CSEA will be notified in writing within 24 hours of any such suspension. A notice of discipline shall be served in accordance with subdivision a of this section no later than 72 hours following any such suspension.

k. The State and CSEA shall jointly agree within 60 days of the execution of this Agreement on a panel or regional panels of disciplinary arbitrators. Each member of the panel shall be assigned a number in rotation and in the event of a disciplinary arbitration, the first available arbitrator in order shall serve as the arbitrator.

l. All fees and expenses of the arbitrator, if any,

shall be divided equally between the appointing authority and CSEA or the employee if not represented by CSEA. Each party shall bear the costs of preparing and presenting its own case. The estimated arbitrator's fees and estimated expenses may be collected in advance of the hearing.

m. Either party wishing a transcript at a disciplinary arbitration hearing may provide for one at its own expense and shall provide a copy to the arbitrator and the other party.

n. In the case of an employee who speaks only Spanish, the written statements required by subdivision a of section 33.3 and subdivision c of this section shall also be given in a Spanish translation.

o. An employee shall not be disciplined for acts, except those which would constitute a crime, which occurred more than one year prior to the notice of imposition of discipline.

33.5 Shift, pass day, job assignment, transfer or reassignment to another institution, station or work location shall not be made for the purpose of imposing discipline.

33.6 Applicability

This entire disciplinary procedure shall apply to all persons currently subject to Sections 75 and 76 of the Civil Service Law and, in addition, shall apply to those non-competitive class employees described in Section 75 (1) (c) who, since last entry into State service, have completed at least two years continuous service in the non-competitive class and those persons in the labor class who, since last entry into State service, have completed at least two years of continuous service in the labor class.

33.7 Evaluation and Reopener

The State and CSEA agree to evaluate the operation of this disciplinary procedure and either party shall have the right, by giving notice prior to October 1, 1974, to reopen negotiations solely with respect to amendments to this Article, effective no earlier than April 1, 1975. All provisions of this Agreement (including this Article) will remain in full force and effect during the course of any such reopened negotiations.

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of December , one thousand nine hundred and seventy-nine.

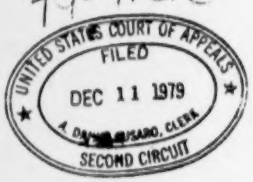
Present: HONORABLE HAROLD R. MEDINA,

HONORABLE WALTER R. MANSFIELD,

HONORABLE THOMAS J. MESKILL,

Circuit Judges.

79-7103



EUGENE B. DINKIN,

Plaintiff-Appellant,

-against-

DINU GANEA, KENNETH GLATT, ALVIN MESNIKOFF, JACK O'BRIEN, PATRICIA OULTON and ARNOLD WINSTON,

Defendants-Appellees.

Docket No. 79-7103

Upon this appeal from a judgment of the District Court for the Eastern District of New York entered on January 23, 1979, by Judge Mark A. Costantino granting defendants' motion for summary judgment dismissing appellant's complaint under 42 U.S.C. §1983, which sought compensatory and punitive damages in excess of $200,000 based upon alleged violations of his rights under the First Amendment and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, together with pendent claims for libel and medical malpractice, after reviewing the records and parties' briefs, oral argument having been waived, we

AFFIRM the judgment of the district court for substantially the reasons stated by Judge Costantino in his decision dated January 23, 1979.

Harold R. Medina, U.S.C.J.

Walter R. Mansfield, U.S.C.J.

Thomas J. Meskill, U.S.C.J.

Supreme Court, U.S.
FILED
DEC 10 1980
MICHAEL RODAK, JR., CLERK

No. 80-787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EUGENE B. DINKIN,

Petitioner,

against

DINU GANEA, KENNETH GLATT, ALVIN MESNIKOFF, JACK O'BRIEN, PATRICIA OULTON and ARNOLD WINSTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7403

SHIRLEY ADELSON SIEGEL
Solicitor General

PATRICIA C. ARMSTRONG
Assistant Attorney General
of Counsel

Question Presented

Whether the action of state officials in applying a state statute was unconstitutional where state court determinations as to the validity of the statute conflicted with a lower federal court's finding of unconstitutionality which finding was later vacated by the United States Supreme Court?*

---

* Additional claims were raised by the petitioner in the District Court and the Court of Appeals. Petitioner has apparently abandoned such claims as they are not included in his petition to this Court.

TABLE OF CONTENTS

PAGE

Question Presented

Decisions Below 1

Jurisdiction 2

Facts 2

The District Court Opinion 4

The Opinion of the Court of Appeals 5

REASON FOR DENYING CERTIORARI:

The Court below correctly held that the direction to petitioner to appear for a medical examination pursuant to New York Civil Service Law § 72 during the pendency of *Snead* v. *Department of Social Services of the City of New York* was not unconstitutional on the facts presented and in light of contrary state court determinations 6

Conclusion 10

Appendix "1" 11

I. *Cases* PAGE

Antinore v. *State of New York,* 49 A D 2d 6, 371 N.Y.S. 2d 213 (4th Dept. 1975), aff. 40 N Y 2d 921 (1976) 4

Laurido v. *Simon,* 489 F. Supp. 1169 (SDNY 1980) .. 6

Leonard v. *Sugarman,* 466 F 2d 1366 (2d Cir. 1972) .. 8

Matter of Barhite v. *Dyson,* 63 A D 2d 1051, 405 N.Y.S. 2d 816 (3rd Dept. 1978) 8

Matter of Brockman v. *Skidmore,* 43 A D 2d 572, 349 N.Y.S. 2d 120 (2d Dept. 1973) 8

Matter of Cooperman v. *Commissioner,* 86 Misc. 2d 610, 382 N.Y.S. 2d 700 (Sup. Ct. Albany County 1976) 8

Matter of Greenwald v. *Frank,* 47 A D 2d 628, 363 N.Y.S. 2d 955 (2d Dept. 1975) 9

Matter of Penebre v. *Dzaluk,* 51 A D 2d 574, 378 N.Y.S. 2d 767 (2d Dept. 1976) 8

Procunier v. *Navarette,* 434 U.S. 555 (1978) 9

Snead v. *Department of Social Services of the City of New York,* 355 F. Supp. 764 (SDNY 1973) (three-judge court), vacated and remanded *sub nom. Civil Service Commission of New York* v. *Snead,* 416 U.S. 977 (1974), reaffirmed, 389 F. Supp. 935 (SDNY (three-judge court), vacated and remanded for consideration of mootness *sub nom. Civil Service Commission of New York* v. *Snead,* 421 U.S. 982 (1975), motion for entry of judgment granted, 409 F. Supp. 955 (SDNY 1975) (three-judge court), vacated and remanded *sub nom. New York Civil Service Commission* v. *Snead,* 425 U.S. 457, rehearing denied, 426 U.S. 942 (1976) 5, 6, 7, 8, 9

PAGE

United States ex rel. Lawrence v. *Woods*, 432 F. 2d 1072 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971) 9

Walker v. *Walker*, 51 A D 2d 1029, 381 N.Y.S. 2d 310 (2d Dept. 1976) 9

II. *Constitutional Provisions and Statutes*

First Amendment 5

Fourteenth Amendment 5

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 5

New York Civil Service Law,

§ 72 .....3, 5, 6, 7, 8, 9

§ 75 4

§ 76 4

III. *Other Authorities*

Jurisdictional Statement for Appellants in *Civil Service Commission of the State of New York* v. *Snead*, dated December 4, 1975 8

No. 80-787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EUGENE B. DINKIN,

Petitioner,

against

DINU GANEA, KENNETH GLATT, ALVIN MESNIKOFF, JACK O'BRIEN, PATRICIA OULTON and ARNOLD WINSTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Decisions Below

The orders of the United States Court of Appeals for the Second Circuit denying petitioner's motion for a rehearing containing a suggestion for rehearing en banc were entered on April 8, 1980. Copies of same are set forth as Appendix "1" annexed hereto. The decision of the Court of Appeals is reported at 614 F 2d 1286 (Table) and is re-

produced in Appendix "B" to the petition. The decision of the United States District Court for the Eastern District of New York is unreported and is reproduced in Appendix "A" to the petition.

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Facts

The facts are undisputed. Petitioner is a former employee of the New York State Department of Mental Hygiene. At the time of his termination from employment with the Department in March, 1975, he held the permanent civil service position of Psychiatric Social Work Assistant III at South Beach Psychiatric Center ("SBPC"), a facility of the Department of Mental Hygiene. Respondents are all employees of the Department of Mental Hygiene who, during the period in question, occupied various positions at SBPC. The events leading to petitioner's termination from employment at SBPC are the subject of the instant action.

Petitioner, in his capacity as a Social Work Assistant III, worked as a clinical therapist at SBPC. He had a full caseload of patients, many of whom had a chronic history of mental illness, and his duties included managing his patients' medication, providing supportive psychotherapy and various administrative matters such as arranging for psychiatric evaluations, referrals of patients for rehabilitation and attendence at staff meetings.

For many months prior to petitioner's termination from employment at SBPC, various co-workers and supervisors had become disturbed by the strange and bizarre behavior being exhibited by petitioner, for example, inappropriate,

threatening and hostile responses to otherwise innocuous situations, a preoccupation with the asserted homosexuality of a large number of his co-workers, his stated fears and negative physical reaction to working on church property in the presence of priests and nuns, whom he considered to be perverted. Repeated instances of such behavior prompted several of petitioner's superiors, some of whom are psychiatrists, to the conclusion that petitioner was seriously disturbed and should not be in contact with emotionally disturbed patients.

Following petitioner's rejection of a recommendation of a medical leave of absence, SBPC twice sought and obtained an appointment for petitioner at the New York State Employee Health Service pursuant to authority granted under New York Civil Service Law § 72(1).* While informed of both appointments and the consequences of his failure to keep them, petitioner kept neither appointment.

On the basis of petitioner's failure to comply with the direction of SBPC regarding the medical examination,

---

* That section states as follows:

"1. When in the judgment of an appointing authority an employee is unable to perform the duties of his position by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's compensation law, the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction. If, upon such medical examination, such medical officer shall certify that such employee is not mentally fit to perform the duties of his position, the appointing authority may place such employee on leave of absence. An employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons therefor. An employee on such leave of absence shall be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his credit."

on February 10, 1975, he was suspended with pay and served with a notice of discipline which outlined the charges against him, i.e., insubordination for failure to keep the above described appointments, and the procedures available to him to contest the charges and the proposed penalty of termination from employment at SBPC. Petitioner filed a grievance in opposition to the notice of discipline and thereby commenced the grievance procedure under Article 33 of his union's contract with the State.* A meeting pursuant to such procedure was scheduled and petitioner was so informed. Prior to the completion of the procedure, which would have afforded him a hearing before an impartial arbitrator with the right to representation by an attorney, petitioner withdrew his grievance. Thereafter, on March 25, 1975, in accordance with the notice of discipline and section 33.4(d)** of the State-CSEA agreement, SBPC informed petitioner that his employment was terminated effective February 24, 1975. Through the use of accrued vacation credits, he was paid through March 12, 1975.

The District Court Opinion

Petitioner brought this action in the United States District Court for the Eastern District of New York in

---

* The disciplinary procedure followed was in accordance with the requirements of the contract between plaintiff's union, the Civil Service Employee Association ("CSEA") and New York State. A copy of the applicable agreement is an Appendix to the District Court's decision. The disciplinary procedure provided in this agreement is in lieu of the procedure prescribed in New York Civil Service Law §§ 75 and 76. See *Antinore* v. *State of New York*, 49 A D 2d 6, 371 N.Y.S. 2d 213 (4th Dept. 1975), aff., 40 N Y 2d 921 (1976) in which the constitutionality of the arrangement was upheld.

** Section 33.4(d) states as follows:

> "The penalty proposed, or such other penalty as directed by the arbitrator, may not be implemented (a) until the employee fails to file a grievance within 10 days, (b) fails to file a timely appeal as provided below, or until and to the extent that it is upheld by the disciplinary arbitrator."

September, 1975 pursuant to 42 U.S.C. § 1983 and sought compensatory and punitive damages in excess of $200,000 against respondents for their alleged violation of his rights under the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Pendent state claims were also included. On January 24, 1979, the District Court (COSTANTINO, J.) granted respondents' motion for summary judgment in their favor. In its opinion, the District Court found, *inter alia,* that the direction to petitioner to appear for a medical examination pursuant to Civil Service Law § 72 was proper. The existence of a lower federal court determination of the unconstitutionality of Section 72 in *Snead* v. *Department of Social Services of the City of New York,* 355 F. Supp. 764 (SDNY 1973) (three-judge court), vacated and remanded *sub nom. Civil Service Commission of New York* v. *Snead,* 416 U.S. 977 (1974), reaffirmed, 389 F. Supp. 935 (SDNY) (three-judge court), vacated and remanded for consideration of mootness *sub nom. Civil Service Commission of New York* v. *Snead,* 421 U.S. 982 (1975), motion for entry of judgment granted, 409 F. Supp. 955 (SDNY 1975) (three-judge court), vacated and remanded *sub nom. New York Civil Service Commission* v. *Snead,* 425 U.S. 457, rehearing denied, 426 U.S. 942 (1976), did not render the application of the statute to petitioner unconstitutional, particularly in light of the ultimate disposition of the *Snead* litigation and conflicting state court precedent. The District Court also found that on the undisputed facts presented, even assuming that the federal court determination of unconstitutionality was binding precedent, petitioner's claim would still fail due to the presence of adequate safeguards to petitioner's constitutional rights.

The Opinion of the Court of Appeals

On December 11, 1979, the Court of Appeals for the Second Circuit affirmed the judgment of the District Court

for substantially the reasons stated by the District Court in its decision. Petitioner's motions for rehearing with a suggestion for rehearing en banc were denied by the court on April 8, 1980.

REASON FOR DENYING CERTIORARI

The Court below correctly held that the direction to petitioner to appear for a medical examination pursuant to New York Civil Service Law § 72 during the pendency of *Snead* v. *Department of Social Services of the City of New York* was not unconstitutional on the facts presented and in light of contrary state court determinations.

Petitioner claims that his employers had no authority to direct him to appear for a medical examination under New York Civil Service Law § 72 because that statute had been declared unconstitutional by a lower federal court in *Snead* v. *Department of Social Services of the City of New York, supra.* Hence, he argues, the application of the statute to him was unconstitutional.*

Petitioner's contention is without merit on two grounds. First, petitioner chooses to ignore the fact that even assuming the District Court finding of unconstitutionality in *Snead* was binding precedent, it would not support his claim. The challenge by Ms. Snead was based on her

---

* It should be noted that petitioner does not and has never challenged the constitutionality of Civil Service Law § 72. In a recent case in which the statute was challenged, the United States District Court for the Southern District of New York, on facts distinct from those presented herein, declared Section 72 unconstitutional on the ground that it fails to provide minimal due process safeguards. See *Laurido* v. *Simon,* 489 F. Supp. 1169 (SDNY 1980). In *Laurido,* a permanent civil service employee after a medical examination was placed on involuntary leave of absence on a finding of mental unfitness without notice of the facts on which the finding was based and without an opportunity to challenge those facts.

placement on an involuntary leave of absence *without* pay following a determination, after a medical examination, that she was mentally unfit to perform her duties. No hearing was provided prior to such placement. The District Court in *Snead* found Section 72 constitutionally defective on the ground that no hearing was provided by that section. The court stated:

> "Although we hold that defendants must conduct an adversarial hearing before placing civil service employees in permanent status on involuntary leave of absence for mental unfitness in the absence of exceptional circumstances requiring immediate action, we do not prescribe the precise form such hearings should take. It is up to the state to determine which of the many potential formats it deems most appropriate. All that the Constitution requires is that before involuntary leaves of absence are effectuated, which may continue for one year without pay, tenured civil service employees charged with a mental disability be granted a hearing containing the 'rudimentary due process' necessary to the accurate determination of the validity of the allegation. This section 72 fails to do." 335 F. Supp. at 773. (Footnotes omitted).

In contrast, petitioner herein never appeared for the medical examination, was informed of the charges against him, afforded the opportunity for a hearing and continued on the payroll until he failed to take advantage of the available procedures. Indeed, petitioner does not contest the adequacy of the procedures afforded him. Thus, the constitutional defect found in *Snead* is not present herein.*

---

* The *Snead* court did not require a hearing prior to a Section 72 direction to appear for a medical examination.

(footnote continued on following page)

Equally devastating to petitioner's argument is the fact that during the period in question, CSL § 72 had *not* been declared unconstitutional by New York state courts. Indeed, to the contrary, during the time that the *Snead* District Court determination of unconstitutionality was purportedly binding as to respondents,* New York courts, in the very judicial district in which SBPC is located, affirmatively required the use of the procedures and requirements of Section 72. See *Matter of Penebre* v. *Dzaluk,* 51 A D 2d 574, 378 N.Y.S. 2d 767 (2d Dept. 1976); *Matter of Brockman* v. *Skidmore,* 43 A D 2d 572, 349 N.Y.S. 2d 120 (2d Dept. 1973). See also *Matter of Barhite* v. *Dyson,* 63 A D 2d 1051, 405 N.Y.S. 2d 816 (3rd Dept. 1978); *Matter of Cooperman* v. *Commissioner,* 86

(footnote continued from preceding page)

> "For example, the State may choose to retain the current psychiatric examination and hold an adversary hearing after its completion and introduce it as evidence at that proceeding. No doubt there are other alternatives. It is also appropriate to note that due process does not require both a prior and subsequent hearing. Goldberg v. Kelly, 397 U.S. 254, 267 n. 14, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) . . ." *Snead* v. *Department of Social Services of the City of New York, supra,* 355 F. Supp. at 773, n. 38.

See also *Leonard* v. *Sugarman,* 466 F. 2d 1366, 1367 (2d Cir. 1972).

* An examination of the history of the *Snead* litigation reveals that except for a short period of time in its active life of approximately four years, a stay was in existence. On March 29, 1973, following the District Court's first decision (355 F. Supp. 764), a stay was granted pending disposition of an appeal to this Court. On February 13, 1975, the State's motion for a stay was denied following the District Court's second decision (389 F. Supp. 935). A similar application to Justice Blackmun was denied on April 7, 1975. The absence of a stay continued to May 27, 1975 when this Court vacated the District Court judgment and remanded for consideration of the question of mootness (421 U.S. 982). Jurisdictional Statement for Appellants in *Civil Service Commission of the State of New York* v. *Snead,* dated December 4, 1975, pp. 3-9.

Misc. 2d 610, 382 N.Y.S. 2d 700 (Sup. Ct. Albany County 1976).

If petitioner is correct, state officials would be bound, no matter what the pronouncements of state courts, to follow a contrary lower federal court determination while the latter is being vigorously litigated. Such is not the law either in federal, see *United States ex rel. Lawrence* v. *Woods,* 432 F. 2d 1072, 1075-76 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971), or New York state courts, see *Walker* v. *Walker,* 51 A D 2d 1029, 381 N.Y.S. 2d 310 (2d Dept. 1976); *Matter of Greenwald* v. *Frank,* 47 A D 2d 628, 631, 363 N.Y.S. 2d 955, 959-960 (2d Dept. 1975) (*Shapiro,* J., dissenting).

The standard of conduct petitioner seeks to impose on respondents is also unreasonable. It not only requires respondents to make judgments as to which legal determination to follow but assumes they can "predict the future course of constitutional law." *Procunier* v. *Navarette,* 434 U.S. 555, 562 (1978). This point is only further emphasized by the fact, which petitioner seeks to minimize, that the final result of *Snead* was the vacatur of the determination of unconstitutionality of Section 72 by this Court on the basis of a lack of standing of Ms. Snead and a direction to the District Court to dismiss the complaint. 425 U.S. at 458-459.

Section 72 was therefore not unconstitutionally applied to petitioner and the findings of no merit to this claim by the District Court and the Court of Appeals were correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
December 4, 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents

SHIRLEY ADELSON SIEGEL
Solicitor General

PATRICIA C. ARMSTRONG
Assistant Attorney General
of Counsel

APPENDIX "1"

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and eighty.

Present: HON. HAROLD R. MEDINA,
HON. WALTER R. MANSFIELD,
HON. THOMAS J. MESKILL,
Circuit Judges.

79-7103

EUGENE B. DINKIN,
Plaintiff-Appellant

v.

DINU GANEAU, KENNETH GLATT, ALVIN MESNIKOFF, JACK O'BRIEN, PATRICIA OULTON, ARNOLD WINSTON,
Defendant-Appellees

A petition for a rehearing having been filed herein by Pro-Se Eugene B. Dinkin

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

by ROLANNE HENRY
Deputy Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and eighty.

79-7103

EUGENE B. DINKIN,

Plaintiff-Appellant

v.

DINU GANEAU, KENNETH GLATT, ALVIN MESNIKOFF, JACK O'BRIEN, PATRICIA OULTON, ARNOLD WINSTON,

Defendants-Appellees

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by Pro-Se Eugene B. Dinkin, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge

Irving R. Kaufman